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LIEBERMAN

21242

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

FILE: B-206193.3

DATE: March 22, 1982

**MATTER OF:**

Propper Manufacturing Company, Inc.--  
Request for Reconsideration

**DIGEST:**

Prior decision dismissing protest challenging affirmative determination of responsibility is affirmed since record does not establish that decision was based on any error of law or fact.

Propper Manufacturing Company, Inc. (Propper), requests reconsideration of our decision, Propper Manufacturing Company, Inc., B-206193, February 3, 1982, 82-1 CPD \_\_\_\_, in which we dismissed the protest of an intended award to Aesculap, Inc. (Aesculap), the low bidder under solicitation No. 120-82-B-0855 issued by the Defense Logistics Agency (DLA) for certain otoscope and ophthalmoscope sets. We dismissed the protest, which alleged that Aesculap had failed to perform its contractual obligations under prior Government contracts for the same item, because our Office does not review protests of affirmative determinations of responsibility absent circumstances not present in the protest. While the protester asserted that its protest related both to Aesculap's responsibility and to its bid responsiveness, we concluded that, because Aesculap did not take any exception to the solicitation, the only issue actually presented was one of responsibility.

Propper first points out that our decision was issued before we received an affidavit filed by Welch Allyn, another bidder, in support of Propper's protest. This affidavit consists of the conclusions of Welch Allyn's examination and analysis of items which it believes Aesculap intends to supply under the contract. Welch Allyn's analysis details its conclusion that the set does not conform to the solicitation specifications.

To the extent that this analysis was intended to show that Aesculap's bid was nonresponsive, it is not relevant. We so found by dismissing and denying Welch Allyn's protest on the basis that since Aesculap's bid offered to perform the exact thing called for in the solicitation, without

exception, it was responsive. Welch Allyn Incorporated, B-206193.2, March 2, 1982, 82-1 CPD \_\_\_\_\_. We also indicated in that decision that, to the extent the protest alleged that Aesculap would not fulfill its contractual obligation, this was a matter of contract administration which does not relate to the propriety of the award and which our Office does not resolve under our Bid Protest Procedures. Thus, the submission of the Welch Allyn affidavit adds nothing to Proper's protest.

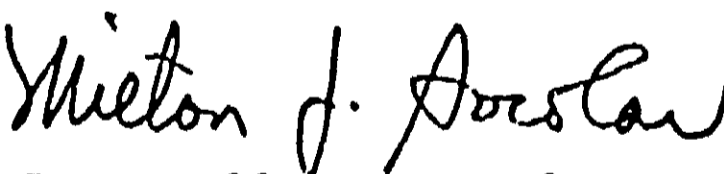
Propper next reargues its position that Aesculap is nonresponsive as well as nonresponsible, because it lacks the capacity to perform the exact thing called for in the solicitation, notwithstanding its contrary representation. However, the concept of responsibility specifically concerns the question of a bidder's performance capability, as opposed to its promise to perform the contract, which is a matter of responsiveness. International Business Investments, Inc., et al., B-198894, February 23, 1981, 81-1 CPD 125.

Propper cites our decision, 46 Comp. Gen. 275 (1966), for the proposition that Aesculap's bid should be rejected as nonresponsive because of Aesculap's apparent intention not to perform as promised. However, that case is inapposite. It concerned a situation where a solicitation called for the offerors to supply a specific type of closed tank container. Prior to bid opening, personnel from the procuring activity advised one bidder only that it could substitute an open truck to satisfy this requirement. The protest was filed after award to this bidder. The agency had found that the awardee had substituted the truck for the required container, and an agency change order had been issued requiring the contractor to modify the truck to conform to the stated requirement. We concluded that the agency had improperly varied the specification requirement for one competitor and had accepted a bid which it knew would be nonresponsive, to the detriment of other bidders. In so concluding, we stated that the apparent responsiveness of the bid was of no consequence under the circumstances, since it had been established that the awardee's bid was submitted and accepted by the agency on the basis of an offer which the agency knew to be nonconforming.

The present case involves only the protester's surmise that Aesculap intends to supply a nonconforming product, based on Propper's assessment of Aesculap's past performance and on Propper's evaluation of the item which it believes Aesculap intends to supply under this solicitation. There is no evidence or assertion of any change or waiver on the part of the procuring activity with respect to this solicitation requirement, nor is there any evidence that Aesculap intends to supply anything other than complying sets, as it has promised to do in its bid.

Propper further alleges that the case involves the misapplication of definitive responsibility criteria. It contends that this is the case because the solicitation contains a requirement for sets meeting stated technical criteria, which Aesculap is unable to meet. However, in this regard, Propper misconstrues the difference between responsibility and responsiveness. The solicitation specifications are the definition of the thing which Aesculap promises to supply, i.e., they are the performance requirements which the agency has requested. Such performance requirements do not become definitive responsibility criteria just because they are stated in detail. Johnson Controls, Inc., B-200466, February 20, 1981, 81-1 CPD 120. Thus, this particular allegation relates to responsiveness, not definitive responsibility criteria.

Since the record does not establish that our prior decision was based on any error of law or fact, we affirm that decision. General Kinetics, Inc.--Reconsideration, B-196813.2, May 6, 1981, 81-1 CPD 348.

*for*   
Comptroller General  
of the United States